Petition

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No.

In the
Supreme Court of the United States
October Term, 1981

HENRY COOPER,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

Ronald F. Neville
221 North LaSalle Street
Suite 2114
Chicago, Illinois 60601
312/263-1900

Matthew P. Walsh
188 West Randolph Street
Suite 2600
Chicago, Illinois 60601
312/236-2100
Counsel for Petitioner

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QUESTIONS PRESENTED

Whether a State court conviction violates the Due Process Clause requiring reversal where the Petitioner is charged by a grand jury indictment with the murder of a named individual, but convicted of the murder of a different person who is not named in the indictment.

Whether the petitioner's due process rights were violated requiring a reversal of his murder conviction where in a circumstantial evidence case, the trier of fact (trial judge) based his finding of guilt on the opinion of an "expert" witness that the wound of the deceased immediately behind his left ear was not self-inflicted, but the "expert's" opinion was totally incompetent and was the result of conjecture and guesswork inasmuch as the "expert" was not trained nor qualified in the science of ballistics or related disciplines, a necessary prerequisite to forming such an opinion, nor did the expert perform any tests to accumulate scientific data to substantiate the opinion.

Whether the petitioner's due process rights were violated requiring a reversal of his murder conviction where in a circumstantial evidence case, the trier of fact (trial judge) based his finding of guilt on the opinion of an "expert" which was inadmissible under State law.

Whether the petitioner's due process rights were violated requiring a reversal of his murder conviction where in a circumstantial evidence case, a rational trier of fact could not have been led to a finding of guilty beyond a reasonable doubt, and could not have reasonably excluded the innocent hypothesis that the deceased died by suicide or accident.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

HENRY COOPER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

The petitioner Henry Cooper respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court, First District, entered in this proceeding on June 4, 1981.

OPINION BELOW

The opinion of the Appellate Court is reported at 97 Ill.App.3d 222, 422 N.E.2d 885, 52 Ill. Dec. 676, and appears in the Appendix hereto. No written opinion was rendered by the Circuit Court of Cook County, Illinois. The Circuit Court's finding, as found in the record, is set out in the Appendix.

JURISDICTION

The judgment of the Illinois Appellate Court for the First District was entered on June 4, 1981. Thereafter, a timely petition for rehearing was filed which was denied on July 8, 1981. Afterwards, a timely petition for Leave to Appeal to the Illinois Supreme Court was filed which was denied on October 19, 1981, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., §1257(3).

STATEMENT OF THE CASE

The petitioner, a Chicago Police Officer for 25 years, was convicted of murder after a bench trial before a judge of the Circuit Court of Cook County, Illinois. The evidence was entirely circumstantial, the State's theory being that the petitioner deliberately killed the decedent, while the petitioner stated the death was the result of suicide or accident.

The petitioner was indicted for the murder of Burt Hampton. (R.441-2) The testimony was that one Hamp Burks was the individual killed, and the defendant was convicted for the murder of Hamp Burks, a person not named in the indictment. Thus the petitioner was charged with one crime, but convicted of another. Count I of the indictment was altered with the words "AKA Hamp Burke" (R.441) and Count II with the words "AKA Hamp Burkes". (R.442) These alterations were done by an unknown person at an unknown time, and were done without grand jury or court approval. The fatal variance between the indictment and proof was raised before the Illinois Appellate Court as a due process violation requiring reversal, and the issue was decided by that court.

The evidence showed that Hamp Burks died on June 30, 1978 in the early morning hours. Police officers who arrived at the scene pursuant to a call by the petitioner found the deceased in a chair with a gun in his left hand. The deceased had a bullet wound behind his left ear (R. 13-20; R. 21-35).

The building was owned by the petitioner. The petitioner's brother Rudolph Cooper, operated a tavern in the premises, and sold packaged goods also. The decedent was found in a rear office of this building.

When the police arrived, the petitioner told them that the decedent had killed himself either by suicide or accident. (R. 44, 88, 137-139) The deceased had been drunk and upset (R. 90, 340, 376). The petitioner was on vacation and was at his building on business. The petitioner asked the decedent to run an errand for him to purchase some hamburgers. When the decedent returned, the petitioner paid him $1.50 for his services which the decedent said was not enough. The petitioner was unwilling to pay more, and at the time of his discussion was placing his police holster on his belt since he was preparing to go home. His gun was on the desk. As a matter of routine, the petitioner placed his holster and gun in a desk drawer until he prepared to leave, and then put the gun on the desk while he positioned his holster. At this time the decedent grabbed the gun, and because of this, the petitioner and his brother, Rudolph Cooper, who was present, ran out of the room. The petitioner heard shots being fired, and when the shots stopped, he entered the room to find the decedent dead. (R. 329-337) The petitioner immedately called the police. (R. 337) There were bullet holes in the ceiling. (R. 68-70)

At trial, the police officers testified that the petitioner said the decedent had shot himself, but claimed the petitioner said he was in the room at the time. (R. 44, 88) However, these police officers had reported to an investigator on the night in question that the petitioner told them he had run from the room and this was contained in the investigator's report (R. 146-148). In addition, this same investigator testified that he took a statement from the petitioner which was consistent with the petitioner's testimony, including the fact he was not in the room at the time of the shooting. (R. 138-139)

In addition to the testimony of the police officers, the respondent called the Cook County medical examiner who had performed an autopsy on the decedent. This medical examiner testified to the cause of death, and in addition, without any qualifications and in the absence of any pertinent testing, said that he did not believe the decedent's wound was self-inflicted.

The pathologist testified that he conducted an autopsy on the decedent, consisting of an external and internal examination. In examining the wound, he found no strippling or tatooing around the bullet wound (R. 258). The black discloration surrounding the entrance wound was, he thought, lead, grease or dirt from the bullet (R. 259-266). He later admitted he performed no tests whatsoever to determine what substance caused the discoloration and further admitted the discoloration could have been gunpowder. (R. 269-271) If tests had been performed, and the discoloration shown to be gunpowder, it would have conclusively shown the wound to be a contact wound entirely consistent with suicide or accident.

After the autopsy, the pathologist signed a temporary death certificate and designated the manner of death as ". . . pending further investigation" (R. 284). According to his testimony, after the autopsy was performed, he did not consider the manner of death to be homicide (R. 286), and further stated that the manner of death ". . . was a question mark in my mind." (R. 290) Notwithstanding this, on July 5, 1978, the pathologist signed the permanent death certificate and stated that the manner of death was homicide. Although he made this determination without conducting any further examination of the body or other tests (R. 291), his decision was based on a review of the case and discussions he had with the case investigator. (R. 286) The identity of the investigator and the contents of those discussions are unknown and not part of the record in this case.

The pathologist admitted the decedent's wound could have been an open contact wound, which he defined as a wound caused from a gun where the muzzle is held a 10th or 20th of an inch from the skin. He conjecturized however that the gun was 2 to 6 inches or more from the skin due to the fact (1) the bullet entered the head at a 15° to 20° angle (R. 266-267), (2) there was an absence of strippling or tatooing around the wound and (3) the discoloration in the wound was lead, grease or dirt (R. 253-258). This opinion was formulated even though this pathologist admitted:

> (1) No tests were performed on the black discolored tissue surrounding the entrance wound to determine whether it was lead, grease, dirt or gunpowder. The presence of gunpowder would be indicative of a contact wound. (R. 270)
>
> (2) No tests were performed on the weapon or bullets to determine the powder residue left by this particular weapon when discharged (R. 267-268);

(3) The pathologist was not a ballistics expert (R. 267-268) and not familiar with the tests performed by such experts in determining firing distances of weapons (R. 277).

(4) Although the age of the powder in the bullets would affect the pathologist's opinion, he had no knowledge of the age or type of powder in the bullets held by this particular weapon (R. 267-268);

(5) The pathologist rejected neutron activation analysis or the paraffin tests as useful in determining that the deceased did not fire the weapon causing his death, notwithstanding known authorities accept and use these tests; (R. 289)

(6) The pathologist assumed facts which were not in evidence in determining that the manner of death was homicide (R. 286).

There was nothing wrong with the deceased's left arm or hand (R. 274-275). It would not have been impossible for the decedent to have inflicted the wound he was found with (R. 266-267).

Recognizing the fact the pathologist's opinion that the wound was not self-inflicted was based on the distance of the gun from the decedent's head, as well as unknown facts from an unknown investigator, and further recognizing the pathologist's total lack of qualifications and complete failure to conduct testing, the petitioner made a motion to strike the pathologist's testimony (R. 296-309, 465). This motion was denied by the trial court, who then accepted and relied heavily on this incompetent opinion in finding the petitioner guilty. This issue of the medical examiner's incompetency and the motion to strike was raised before the Illinois Appellate Court who decided the issue on the sole basis that the petitioner had stipulated the witness was an expert in forensic

pathology. The record shows however that the petitioner stipulated to the doctor's expertise to determine cause of death, not whether the wound was self-inflicted. (R. 297, 306-309)

The State added to the impeached testimony of the police officers, the improbable and unconvincing testimony of Aaron Smith. Smith stated that he was in the front of the store when he heard gun shots which came from the back room. He then saw the defendant exit the back room (R. 166-169), and go into another room where he fired one or two shots. (R. 169-170, 183, 204-205, 209) Subsequently the witness testified he did not know how many shots the petitioner fired (R. 209), even though he had given a statement to the police indicating the petitioner shot twice. (R. 208-209) Smith said the defendant next returned to the back room, and afterwards the petitioner came to the front of the store and said to Cheffronio Cooper, "I just shot Burk, come on Fronio and look. (R. 168-171)

This evidence must be judged in light of the additional testimony offered by Smith.

Smith said that during the shooting he was calm while everybody else was excited and fighting to get out of the door. Smith just stood out of the way and watched everyone else. (R. 204-207) Smith was then going to leave but returned to get his Suzy Q cupcake. (R. 179) He then left out the front door. He saw some police arrive and then left. (R. 179-180) Smith could not remember where he went, either to his house or to a friend's house, or what he went back to his house for. (R. 180, 190-192) Thereafter he returned to the 150 Club, but did not talk to any police (R. 180-181), even though the police testified they asked if anyone had been

in the store at the time of the incident. (R. 155-156, 212-213) After staying for 10 or 15 minutes across the street, he left. He does not know where he went. (R. 199)

Smith talked to the police the next day but only after talking to Nash Burks (R. 200-201), who was the son of the deceased. (R. 190) Smith and Nash Burks were friends, and Nash was also a friend of Smith's older brother. (R. 200-201)

At one point Smith testified he went to the police by himself (R. 200-201), but then admitted the police picked him up after Nash called the police. (R. 202-203, 229-230) He said he was at the station for one hour and 45 minutes before he gave his statement (R. 202), and then said he was with the police 4 to 5 hours before he gave the statement. (R. 202-203) He also testified he did not know the petitioner did not turn himself in, but then admitted he had said the direct opposite in his statement to the police. (R. 225-226)

After giving his statement to the police the witness was taken to a Chicago Hotel. His lodgings and food were paid for by the police. (R. 188-189) He was sent to the hotel because he was afraid of the Cooper family (R. 219-220), but after 4 or 5 days he went home (R. 188-189), apparently unafraid of the Cooper family by this time.

He never told anyone else what he had seen. (R. 218)

The prosecution never introduced a motive for the alleged homicide.

There was a stipulation that a fingerprint expert found the petitioner's fingerprint on the gun, which was owned by the petitioner, and those of Officer James Kelly. He

found no fingerprints of the deceased but there were smudges present which were not suitable for comparison. There were several unidentified prints on the weapons which were suitable for comparison. (R. 235-237)

There was a further stipulation that the bullet recovered from the deceased was fired from the petitioner's gun. (R. 238-240)

The total insufficiency of the evidence was raised in the lower court (R. 464) and the same issue was presented to the Illinois Appellate Court.

REASONS FOR GRANTING THE WRIT

1. THE PETITIONER WAS CHARGED WITH ONE CRIME, BUT CONVICTED OF ANOTHER. THE ILLINOIS APPELLATE COURT SUMMARILY DISMISSED THIS SERIOUS DUE PROCESS VIOLATION AS A MERE MATTER OF FORM, AND THIS COURT SHOULD GRANT THE WRIT TO CORRECT THIS INJUSTICE.

The indictment in the case at bar charged, in both counts, that the defendant committed murder in killing Burt Hampton (R. 440-442).

All the testimony in the case shows that the person for whose death the defendant was convicted was a person other than Burt Hampton (R. 14-20; 104-110, 138, 245) The State argued the deceased was Hamp Burks. (R. 378), and the Illinois Appellate Court wrote the deceased was Hamp Burks, *People* v. *Cooper,* 97 Ill. App. 3d 202, 422 N.E.2d 885, 886.

The Due Process Clause of the United States Constitution prohibits a person from being charged with one crime and convicted of another. *Presnell* v. *Georgia,* 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207; *Cole* v. *Arkansas,* 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644.

A defendant cannot be convicted on the basis of facts not found by or perhaps not even presented to the grand jury. *U.S.* v. *Keith,* (C.A. 9th) 605 F.2d 462.

In *U.S.* v. *Tobin,* 576 F.2d 687, 695 (C.A. 5th, 1978) 439 U.S. 1051, 99 S.Ct. 731, 58 L.Ed.2d 711, the Court wrote:

> "The Rule that the allegations in an indictment must correspond to the proof at trial is based on three considerations: (1) that the accused have proper notice of the charges against him; (2) that there be no infringement of the accused's right to be

> tried only on the charges presented in an indictment by the grand jury; and (3) that an accused be protected against another prosecution for the same offense."

Certainly, in the case at bar, the petitioner was not afforded all three safeguards referred to above. The petitioner is plainly not protected from a second trial on the same charge nor was the petitioner tried only on the charges presented in the indictment by the grand jury or given proper notice of the charges.

The Illinois Appellate Court summarily dismissed this due process violation as "form over substance". *People* v. *Cooper,* 97 Ill. App.3d 222, 422 N.E.2d 885, 887. In so doing, the Appellate Court apparently relied on an "amendment" to the indictment which was never authorized by the grand jury or even the Circuit Court. *People* v. *Cooper,* 97 Ill. App.3d 222, 422 N.E.2d 885, 887.

The indictment was altered in that the words "AKA Hamp Burke" were written on Count I of the indictment (R. 441), and the words "AKA Hamp Burkes" were written on Count II of the indictment (R. 442). These alterations of the indictment were done by an unknown individual at an unknown time, and were done without court or grand jury approval. Nowhere in the record of proceedings or in the common law record does any reference to the amendment appear. Substantive amendments of this type require grand jury approval under both federal law as well as the law of the State of Illinois. *Russell* v. *United States,* 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240; Ill. Rev. Stat., Chap. 38, Section 111-5; *People* v. *Jones,* 4 Ill. App.3d 870, 282 N.E.2d 23, rev. on other grounds, 53 Ill.2d 460, 292 N.E.2d 361.

Without question, some unknown person, and not the grand jury of Cook County, scribbled some words on the

indictment. This procedure should not allow the Illinois Appellate Court to ignore the clear and substantial violation of the Due Process Clause which exists here.

2. THE DEFENDANT WAS DENIED DUE PROCESS IN THAT THE PROSECUTION'S EVIDENCE WAS INSUFFICIENT TO LEAD A RATIONAL TRIER OF FACT TO FIND THE PETITIONER GUILTY BEYOND A REASONABLE DOUBT AND THE CORE OF THE PROSECUTION'S CASE WAS BASED ON TOTALLY INCOMPETENT AND INADMISSIBLE EVIDENCE.

A.

THE CORE OF THE PROSECUTION'S CASE WAS BASED ON THE OPINION OF A WITNESS THAT THE WOUND WAS NOT SELF-INFLICTED, BUT THE WITNESS HAD ABSOLUTELY NO QUALIFICATIONS OR ANY SCIENTIFIC DATA TO RENDER SUCH AN OPINION CAUSING THE EVIDENCE TO BE INCOMPETENT.

This Court has said that Due Process requires more than simply a trial ritual. A defendant is entitled to a trial where he is proved guilty beyond a reasonable doubt. The standard is not whether there was "no evidence," but whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson* v. *Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, *In Re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368.

In the case at bar, the core of the prosecution's case rested on the pathologist's opinion that the wound was not self-inflicted, and the trial judge relied heavily on the opinion in determining guilt. However, the pathologist

was absolutely unqualified to render such an opinion because of his lack of training and his complete failure to perform pertinent tests. The petitioner's conviction rests on the word of a witness founded in guesswork, conjecture, no training and complete incompetence.

If the Court's opinions in *Jackson* and *Winship* are to have any true meaning, they must stand for the proposition that in viewing the evidence to determine whether any rational trier of fact could have found guilty beyond a reasonable doubt, only *competent* and *admissible* evidence should be considered.

The petitioner's right to due process was seriously violated in this case because his conviction is founded upon incompetent evidence rendered by an unqualified expert.

The doctor's lack of qualifications and complete failure to perform pertinent tests is obvious and set out below.

The doctor's opinion that the wound was not self-inflicted apparently arose from the lack of tatooing around the wound causing him to conclude that the weapon was not held near the head when fired. However, to make this determination one must, in addition to examining the wound, examine the weapon in question to determine its firing and powder residue patter. Tattooing[1] around a wound indicates the fired weapon was

[1] "d. A tatooing of the epidermal layer of skin with embedded grains of burned or partially burned powder may occur in close wounds but not in contact wounds. Unburned, smokeless powder tattoos embed themselves in skin. Unburned, black powder only smudges the skin. Partially burned grains of either type of powder burn themselves into the skin. Powder tatoos cannot be rubbed off. The proportion of unburned powder depends on the

not up against the head, but some distance in inches from the head. How far depends on the manner in which the specific weapon leaves a tatooing pattern. But the absence of tatooing, as in this case, does not conclusively mean the weapon was so distant from the head that partially burned powder did not reach the skin, since this tatooing does not occur with a contact (gun on the skin) or close contact wound. In a contact or close contact wound, gunpowder would be found inside the wound as black discoloration exactly as in the case at bar. Moenssens, Moses and Inbar, *Scientific Evidence in Criminal Cases,* 1973, The Foundation Press, Inc., pp. 181-185.

And although the parties stipulated that the pathologist was an expert in the field of forensic pathology (R. 244), this did not automatically permit or qualify the doctor to testify that the wound was not self-inflicted. In fact petitioner's counsel told the Circuit Court the stipulation was intended to mean the witness was qualified to testify to the cause of death, and not to whether or not the wound was self-inflicted. (R. 297, 306-309) Clearly, the doctor stated he was not a ballistics expert and knew nothing about firearms, the specific gun which caused the wound, or the type of gunpowder that was used. The doctor admitted that he had not conducted any examination of the cartridges found in the weapon, and had no idea of the powder ratio for a Winchester Wesson .38 caliber

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[1] (Continued)
barrel length, type of powder and gas pressure. Different types of ammunition, even though fired from the same gun, may give different powder patterns because of variance in powder type, concentration, load and dampness." Moenssens, Moses & Inbar, *Scientific Evidence in Criminal Cases,* 1973, The Foundation Press, Inc., pp. 183.

bullet. He did not know how many grains of powder were in one of the bullets, did not know the age or type of powder in the bullet even though this information would have had an effect on his decision as to whether or not there were powder burns surrounding the wound. He never performed any tests on the weapon to determine the gun's firing or gunpowder residue pattern. (R. 267-269) Although he initially claimed that the smudging that he observed around the wound was grease or lead (R. 259-260), he subsequently conceded that the smudging could have been powder, and that he conducted no tests to identify the substance which caused the smudging. (R. 269-270) Even though he indicated that the angle of the gun to the head as 15°-20°, he never stated that it was impossible for the deceased to have held the weapon at that angle at the time the gun was discharged. (R. 266-267)

He further admitted that he was not familiar with tests to determine firing distances of weapons and at what distances a weapon will leave strippling or tattooing (R. 277), nor was he familiar with tests that are conducted to determine the presence of powder on a person's hand or extremity. (R. 277-280) Although he knew of the paraffin test and the neutron activation analysis test, he could not describe the paraffin test as it was not in his field (R. 280), and he further testified that he had no experience with the neutron activiation analysis test although he thought it was worthless. (R. 277, 289) He admitted, however, that an examination of the hand of the deceased would have been helpful to him in determining whether or not the wound was self-inflicted. (R. 281-282) The doctor's determination that neutron activation analysis is worthless indicates his lack of train-

ing and knowledge. The test is recognized as valid by known authorities. This test could have determined if the discoloration in the wound was gunpowder. See: "Evidential Problems for Gunpowder Residue Tests," Donnie Rudd, *Illinois Bar Journal*, July, 1971, Volume 59, No. 11, p. 918, Rudzitis, Kopina and Wahlgren, "Optimization of Firearm Residue Detection by Neutron Activiation Analysis," *Journal of Forensic Sciences, Volume* 18, No. 2 (April, 1973). At the very minimum, he could have determined by means of a paraffin test that the deceased did not fire a gun if no nitrates were present. Richardson, *Modern Scientific Evidence*, The W. H. Anderson Company, 2nd Edition, p. 583 (1974).

Even though the pathologist maintained the wound was not self-inflicted the doctor admitted on cross-examination the wound could have been an open contact wound placing the gun a tenth or twentieth of an inch away from the head. (R. 253) This of course is consistent with suicide or accident. And he also said the gun could have been as far as a mile from the decedent at the time it was discharged. (R. 252-253) This inconsistent and indefinite testimony cannot lead to a *competent* opinion that a wound was not self-inflicted. Because of the doctor's lack of training and knowledge, and failure to perform pertinent tests, the Circuit Court should not have allowed the doctor to render the incompetent opinion he did, nor should the Court have relied on his completely unreliable evidence.

Although the defendant presented all of the above to the Illinois Appellate Court, that court determined that the pathologist was qualified to render such an opinion on the sole basis that the parties stipulated to the fact that he was an expert in the field of forensic pathology.

Such a stipulation apparently conclusively meant to the Appellate Court that the pathologist could testify to any opinion he held. However, the fact the witness was a forensic pathologist did not establish, *ipso facto*, the doctor's competency to testify to the opinion that he did or for the lower court and the Appellate Court to rely on an incompetent opinion. As stated earlier, petitioner's counsel told the Circuit Court the stipulation was intended to mean the witness was qualified to testify to the cause of death, and not to whether or not the wound was self-inflicted. This is the basis upon which petitioner made his motion to strike the incompetent opinion. (R. 297, 306-309)

A forensic pathologist is certainly competent to testify to the cause of death, the trajectory of a bullet inside the body and the injury to tissues caused by that bullet. However, he is without question incompetent to testify to the proximity of a particular gun to the victim's head and how it was held in relation to the body without additional training. Opinions of this nature require specific knowledge of ballistics, gunpowder, the gun in question, physics and results of testing never performed in this particular case.

Notwithstanding the Illinois Appellate Court's conclusion to the contrary, a ballistics expert, having tested the particular weapon and the powder of the bullets, is the only person who could testify to the distance of the weapon from the head of the deceased and whether or not the barrel of the weapon was in contact with the skin at the time of discharge.

In addition to the lack of qualifications of the pathologist to render the opinion he did, and the lack of testing, the doctor's opinion is also incompetent and in-

admissible evidence since it was based on facts not present in the record and unknown to anyone but himself.

The temporary death certificate signed by Dr. Stein indicated the manner of death as ". . . pending further investigation." (R. 284) According to his testimony, after the autopsy was performed, he did not consider the manner of death to be a homicide, (R. 286) and further stated that the manner of death ". . . was a question mark in my mind." (R. 290)

On July 5, 1978, the doctor, however, signed the permanent death certificate and stated that the manner of death was homicide. He made this determination without conducting any further examination of the body (R. 291), his decision being based on a review of the case and discussion he had with the case investigator. (R. 286) The identity of the investigator and the contents of those discussions are unknown and not part of the record in this case.

The doctor's testimony concerning the position of the gun relative to the head amounted to reconstructive testimony which is inadmissible under Illinois law where an eyewitness is present. *Abramson* v. *Levinson,* 112 Ill. App.2d 42, 250 N.E.2d 796. The prosecution's theory was that Rudolph Cooper was present during the shooting. (R. 176-178)

In rejecting the Petitioner's Due Process claim, the Illinois Appellate Court stated the testimony of the pathologist was "an important aid to the trial court," *People* v. *Cooper,* 97 Ill.App.3d 222, 442 N.E.2d 885, 888, and concluded that the evidence of guilt was sufficient given the existence of the pathologist's opinion.

The record in this cause reveals that the pathologist's opinion that the wound was not self-inflicted was the foundation of the prosecution's case, and the Circuit Court's finding of guilt rests on that foundation. The petitioner contends that the Due Process clause will not allow such a conviction to stand where the record reveals that the evidence relied upon as sufficient to prove guilt is in reality the incompetent baseless opinions of a untrained and unqualified witness.

B.

THE EVIDENCE IN THIS CASE WAS TOTALLY INSUFFICIENT TO LEAD A RATIONAL TRIER OF FACT TO FIND GUILT BEYOND A REASONABLE DOUBT, AND THUS THE PETITIONER'S DUE PROCESS RIGHTS HAVE BEEN VIOLATED.

The evidence of the petitioner's guilt was not sufficient according to the standard set out in *Jackson* v. *Virginia*, 443 U.S. 307 99 S.Ct. 2781, 61 L.Ed.2d 560 and *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed.2d 368.

The Illinois Appellate Court concluded that the evidence in this case was entirely circumstantial, *People* v. *Cooper*, 97 Ill.App.3d 222, 422 N.E.2d 885, 888, and thus was compelled to apply the standard that where a conviction for murder rests solely upon circumstantial evidence, the guilt of the defendant must be so thoroughly established as to exclude every other reasonable hypothesis of innocence. *U.S.* v. *Barresi*, 601 F.2d 193 (Ca. Fla., 1979); *U.S.* v. *Campion*, 560, F.2d 751 (CA, Ky. 1973); *People* v. *Garrett*, 62 Ill.2d 151, 339 N.E.2d 753.

The prosecution's theory was that the petitioner murdered the deceased, but the petitioner presented the rea-

sonable hypothesis of suicide or accident and such a theory was never excluded. A *rational* trier of fact, as defined in *Jackson* and *Winship,* could not have reasonably excluded the innocent hypothesis given the evidence adduced at trial.

The police officers did not witness the incident. They said the petitioner told them the deceased had shot himself. And while two of the officers testified the petitioner said he was in the room during the shooting, (R. 44, 88-90) they were substantially impeached by another officer to whom they had reported. His report clearly reflected the officers had said the petitioner left the room prior to the shooting. (R. 146-148) That investigator also took a statement from the petitioner which was entirely consistent with the petitioner's trial testimony (R. 138-139).

The prosecution added to the impeached testimony of the police officers the improbable and unconvincing testimony of Aaron Smith. Smith testified that he was in the front of the store when he heard gunshots which came from the back room. He then saw the petitioner exit the back room and go into another room where he fired one or two shots. (R. 166-170, 183, 204-205, 209) Subsequently, the witness testified he did not know how many shots the petitioner fired even though he had given a statement to the police indicating the defendant shot twice. (R. 298-209) Smith stated that the petitioner next returned to the back room and, thereafter, came to the front of the store and stated to Cheffronio Cooper, "I just shot Burk. Come on Fronio and look." (R. 168-171)

The credibility of this testimony must be considered in light of the totality of his testimony. He said that during

the shooting he was calm while everybody else was excited and hurrying to exit the door of the establishment. Smith just stood out of the way and watched everyone else. (R. 204-207) He started to leave but decided to return in order to get his Suzy Q Cupcake. (R. 179) When the police arrived, he left but could not remember where he went. (R. 179-180, 190-192) He subsequently returned to the 150 Club, but did not talk to any police officer even though the police testified they asked everyone present if anyone had been in the store at the time of the incident. (R. 155, 156, 180-181, 212-213) After staying for ten or fifteen minutes, he left and does not know where he went. (R. 199)

Smith further testified that he spoke to the police the following day but it was only after speaking with the son of the deceased, Nash Burks. (R. 200-201) Smith and Burks were friends. (R. 200-201) At one point, Smith testified that he went to the police by himself, but subsequently admitted that the police picked him up after Nash Burks called them (R. 200-201, 202, 203, 229-230). Although he first stated that he was at the police station for one hour and forty-five minutes before giving his statement (R. 202), he subsequently testified he was with the police for four to five hours before giving the statement. (R. 202-203) He also testified that he did not know whether the petitioner turned himself in to the police, but then admitted that he said the direct opposite in his statement to the police officers. (R. 225-226)

After giving his statement at the police station, Smith was taken to a Chicago Hotel where his lodgings and food were paid by the police officers. (R. 188-189) He was relocated, according to his testimony, because of fear of

the petitioner's family (R. 219-220), but after four or five days at the hotel he returned to his home apparently unafraid of the family by this time. (R. 188-189) He further testified that he never told anyone else what he had seen or heard at the 150 Club on the day of the shooting. (R. 218)

The testimony of Aaron Smith should not have been accepted by the trial court because it is not credible, is inconsistent with human experience and suffers from the bias and prejudice of his friendship with the son of the deceased. Smith never spoke to the police or came forward with his information until after a discussion with Nash Burks, someone who had an obvious desire to convince Smith to perjure himself. Smith had every opportunity on the date of the incident to tell the police what he claims he saw and heard and his failure to do so must be considered as impeachment constituting conduct inconsistent with his testimony. Furthermore, the police rewarded Smith for his statement by treating him to a hotel room and free meals for four or five days. Smith's claim that he was afraid of the Cooper family is incredible in light of the fact that after four or five days he went home and received no further protection. Equally ridiculous is Smith's testimony that he stood by calmly after the defendant came out firing a weapon and watched others run for the door. Such conduct is totally inconsistent and improbable with everyday human experience.

Additionally, the prosecution made no attempt to corroborate Smith by showing the existence of two bullet holes in the floor outside of the back room. Smith testified that those shots were fired by the petitioner. This tale by Smith of the petitioner firing the two shots while walking out of the backroom after killing the deceased

is only consistent with a drunk or otherwise crazed individual. The police found the petitioner to be normal, coherent and sober (R. 66-68), thus making Smith's testimony in this regard totally inconsistent with known facts.

Finally, it is ridiculous to believe that the petitioner a policeman of some 25 years experience, would shoot someone and then tell a total stranger like Smith what he had done. Such testimony by Smith is again inconsistent with reasonable human experience.

The testimony of the pathologist was incompetent except as to the cause of death. In addition, the doctor never testified it was impossible for the deceased to shoot himself and thus is not inconsistent with the innocent hypothesis.

No other physical evidence in the case was inconsistent with the premise that the wound was self-inflicted.

No motive was ever shown.

The above evidence, viewed in a light most favorable to the prosecution, could never lead a rational trier of fact to find the petitioner guilty beyond a reasonable doubt by excluding the innocent hypothesis. The hypothesis of innocence in this case was never excluded by competent evidence. The due process standards of *Winship* and *Jackson* have not been met, and the petitioner's conviction should not be allowed to stand.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Illinois Appellate Court for the First District.

Respectfully submitted,

RONALD F. NEVILLE
221 North LaSalle Street
Suite 2114
Chicago, Illinois 60601
312/263-1900

MATTHEW P. WALSH
188 West Randolph Street
Suite 2600
Chicago, Illinois 60601
312/236-2100
Counsel for Petitioner

DECEMBER, 1981

APPENDIX

The PEOPLE of the State of Illinois,

Plaintiff-Appellee,

v.

Henry COOPER,

Defendant-Appellant.

No. 80-430

Appellate Court of Illinois,
First District, Fourth Division.

June 4, 1981.

Rehearing Denied July 8, 1981.

Defendant was convicted in the Circuit Court, Cook County, George Marovich, J., of murder, and he appealed. The Appellate Court, Johnson, J., held that evidence was sufficient to support the conviction.

Affirmed.

JOHNSON, Justice:

Defendant, Henry Cooper, was indicted for murder (Ill.Rev.Stat. 1977, ch. 38, par. 9-1). Following a bench trial in the circuit court of Cook County, he was found guilty and sentenced to 20 years in the Illinois Department of Corrections. On appeal, defendant raises the issues of (1) discrepancies between the indictment and the evidence; (2) the entry of expert testimony into evidence; (3) the admission of an out-of-court statement; and (4) whether he was proved guilty beyond a reasonable doubt. We affirm.

The record reveals that at trial Gloria Gray testified she was the wife of the decedent, Harry Burks. She stated that on the night of June 29, 1978, she received a telephone call from Rudolph Cooper, defendant's brother.

Rudolph owned the 150 Club, a liquor store and lounge, where her husband worked part-time. In his telephone conversation with Gray, Rudolph stated he wanted Burks to come to the lounge and pick up some liquor. Burks consented, leaving the house shortly thereafter. The witness said the next time she saw her husband he was dead. She concluded her testimony by stating that her husband was right-handed and he had known the defendant for several years.

James Kelly, a Chicago police officer assigned to the 5th Police District, testified that on the morning of June 30, 1978 he and his partner, officer Edward Mahon, received a radio call reporting a suspicious man at 150 West 103rd Street, Chicago. Upon arriving at the address, the officers found the premises occupied by the 150 Club. Officer Kelly said he and Officer Mahon entered the lounge and proceeded to a rear room. There, they found the decedent, later identified as Burks, seated at a desk with his head slumped forward, his chin on his chest, and a gun, which was pointed in an upward direction, in his left hand near his waist. The officer stated he took the gun, opened the cylinder and found four expended shells. He checked the body for vital signs and found none. There was a bullet wound approximately 1 inch behind the decedent's left ear. There was no evidence of powder burns. Officer Kelly further testified that defendant admitted being in the room when Burks was shot; that defendant stated he saw Burks fire the gun into the ceiling and into his own head; and that defendant admitted ownership of the gun used. Officer Mahon's testimony was substantially the same as that of Officer Kelly.

Sergeant John Downey of the 5th Police District testified that he answered a call to go to the 150 Club. When he arrived, he immediately recognized defendant as a police sergeant also assigned to the 5th Police District. Sergeant Downey stated that upon observing the decedent he found what appeared to be a bullet wound on the left side of the head. He saw no powder burns.

Investigator Fred Hill of the Chicago Police Department testified that he investigated the shooting and interviewed defendant at the police station. Hill stated that defendant told him Burks was his employee and that after Burks returned from an errand he took defendant's revolver and started shooting. Defendant further told the investigator that once the shooting began, he and his brother, Rudolph, ran from the back room but returned about 5 minutes later and discovered Burks dead.

Aaron Smith offered testimony that he knew defendant and defendant's brother, Rudolph, and nephew, Chiffroneo. Smith was in the 150 Club on the night in question and heard gunshots coming from the back room. Thereafter, he saw defendant come out of the back room armed with a gun and firing at random. According to the witness, there were approximately five people in the front area of the Club; they all left quickly but he stayed and heard defendant say he killed Burks. Smith said he did not talk to the police immediately after the shooting. Further testifying, Smith said that the day after the shooting he saw the decedent's son, Nash Burks, who stated the incident had been set up to look like a suicide. Smith found out that no one had been arrested after the shooting. Burks called the police who eventually interviewed Smith concerning the incident.

The parties stipulated that if the fingerprint examiner testified he would state he examined the .38 caliber revolver found in the decedent's hand and the gun bore a fingerprint identical to the fingerprint of defendant. The parties also stipulated that a firearms expert, if called, would testify that bullet fragments taken from the head of the decedent came frome defendant's gun. It was further stipulated by the parties that Dr. Robert Stein is an expert in the field of forensic pathology. Dr. Stein performed the autopsy and testified at trial that there was no trace of gunpowder on the skin of the decedent; that when a gun is fired from more than a foot, there are normally no power burns; that he formed the opinion that decedent's death was instantaneous and resulted

from the bullet wound to the head; and that he issued a permanent death certificate listing the cause of death as homicide.

Defendant testified in his own behalf. He stated that he had known Burks for approximately 20 years and that Burks ran errands for his brother, Rudolph, who owns the 150 Club. The witness said that on the night of the incident Burks was sent on an errand; upon his return, defendant asked him to go out again to buy hamburgers. Burks did so and when he returned defendant gave him $1.50. Burks told defendant the money was not sufficient, but defendant would not give him more.

Further testifying, defendant stated he then took his revolver out of the desk drawer and placed it on top of the desk so he could put on his holster. Burks then grabbed the gun off the desk. Defendant and his brother ran from the room, and as they were running the gun was being fired. The witness stated that when the shooting stopped he and his brother returned to the back room to discover Burks, dead, in the chair. According to the witness, he sat in the back room with the decedent until the police arrived. Thereafter, he told the officers that Burks had shot himself. Defendant stated that he did not remember telling the officers he had remained in the room while Burks was shot and further stated that he was not in the back room when Burks fired the gun nor did he see Burks shoot the gun.

The trial court ruled that there was no reasonable doubt as to defendant's guilt.

[1] Defendant contends that the discrepancy between the name of the victim originally shown on the face of the indictment and his actual name is an error which could have had an impact on the outcome of this case. Although the indictment charged defendant with the murder of "Burt Hampton" and was later changed to Hamp Burks," we think it a matter of form rather than substance. Where, as here, no hint of surprise or prejudice to defendant is shown, allowance of such an amendment is not

error. (*People* v. *Jones* (1973), 53 Ill.2d 460, 465, 292 N.E.2d 361, 363.) The record is far too clear as to the identity of the victim to entertain the idea that harm may have been done by alteration of the victim's name on the indictment.

[2, 3] Defendant also argues that the trial court should have stricken the testimony of Dr. Stein as an expert witness. It is significant to this court that the parties stipulated the fact that Dr. Stein is an expert in the field of forensic pathology. Therefore, it is only left for this court to determine when expert testimony is admissible and how its admission may be reviewed. In *People* v. *Carbona* (1975), 27 Ill.App.3d 988, 1002, 327 N.E.2d 546, 560, we said:

> "Expert testimony is properly admissible when the subject matter is sufficiently beyond common experience so that only persons of skill or experience are capable of forming a correct judgment as to any connected fact. [Citation.] The prevailing view is that the subject of self-inflicted wounds is not one of such common experience that laymen may not be assisted by the opinion of a doctor who has special knowledge regarding anatomy and injuries to the human body."

The testimony of Dr. Stein assisted the court in understanding the trajectory of the bullet and the effect on tissue in the area of the wound. Not only was Dr. Stein's opinion formulated for the benefit of the court, it was also a reflection of his duty as county medical examiner. Yet, the trial court was not bound to adopt the expert's opinion as its own or as the controlling factor in reaching a determination. We recognize that the trial court is afforded a wide latitude of discretion in determination of such admissibility unless it is clearly and prejudicially erroneous. (*People* v. *Stapleton* (1972), 4 Ill.App.2d 477, 480, 281 N.E.2d 76, 78.) The testimony of Dr. Stein was an important aid to the trial court, was not erroneous, and did not merit exclusion from evidence.

[4] It is suggested by defendant that during the testimony of Aaron Smith repetition of statements made to him by the victim's son was improperly admitted. The decedent's son related to Smith his belief that his father's death had been made to appear as a suicide. The trial court ruled that the testimony was offered not to support the truth of the matter asserted therein but to show the state of mind of witness Smith when he talked with the police. We agree. Further, the probative value of the testimony far exceeded whatever prejudice may have occurred to defendant. Having reviewed the transcript on record, we do not find reversible error in the admission of testimony offered by Smith.

[5] Finally, defendant bases this appeal largely upon the assertion that the State failed to prove him guilty beyond a reasonable doubt. This case is one in which there was no eyewitness to the crime. The evidence used to support the conviction was, therefore, circumstantial.

> "In cases involving circumstantial evidence, it is not necessary for each link in the circumstances relied upon to establish guilt by itself to constitute proof beyond a reasonable doubt. The only requirement • • • is that the circumstances be of a conclusive nature and lead on the whole to the conclusion of guilt by a reasonable and moral certainty." (*People* v. *Pappas* (1978), 66 Ill.App.3d 360, 371-72, 23 Ill. Dec. 163, 171, 383 N.E.2d 1190, 1199.)

We find the standard established in *Pappas* to have been met in this case. The record, including defendant's testimony indicates that the shooting of decedent could only have been done by defendant or the decedent himself. In reading its decision, the trial court was aware of the evidence that defendant produced the gun; defendant's gun was determined to have been the weapon which killed decedent; the decedent's wound was on the left side of his head and no powder burns were on his skin; the gun was found in decedent's left hand but decedent was known to be righthanded; and defendant was the last person to see the decedent alive.

The trial court indicated that defendant was not believable and, while no single factor showed defendant guilty, the evidence as a whole did prove his guilt.

In light of the above, it is not improbable or unlikely that the trial court could have found defendant guilty by a reasonable or moral certainty.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

JIGANTI and LINN, *JJ., concur.*

The petitioner's motion for rehearing was denied on July 8, 1981 as reflected in the Appellate Court's Order set out below:

80-430

In The

APPELLATE COURT OF ILLINOIS

First Judicial District

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

HENRY COOPER,
Defendant-Appellant.

Appeal From Circuit Court, Cook County.
Honorable GEORGE MAROVICH, *Presiding.*

ORDER

This cause coming on to be heard on Petition for Rehearing, and the Court now being fully advised in the premises;

IT IS ORDERED that said Petition For Rehearing be and the same is hereby denied.

DATED AT CHICAGO, ILLINOIS THIS 8th DAY OF JULY, 1981.

ENTER: Order Entered July 8, 1981

/s/ Glenn T. Johnson
Justice

/s/ David Linn
Justice

/s/ M. R. Jiganti
Justice

A petition for leave to appeal before the Illinois Supreme Court was denied on October 19, 1981 as reflected in the letter of Clerk of the Illinois Supreme Court.

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
Springfield, Ill. 62706
(217) 782-2035

October 19, 1981

Walsh & Neville, Ltd.
Attorneys at Law
188 W. Randolph St.
Chicago, IL 60601

In re: People State of Illinois, respondent vs.
Henry Cooper, petitioner. No. 55363.

Gentlemen:

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

CLW/cjv

FINDING OF THE CIRCUIT COURT

"The Court: Thank you, gentlemen.

There are certain things here which are not in dispute, principally that Mr. Hamp Burks is dead, and that he was shot and killed by a weapon that belonged to Sergeant Henry Cooper.

The State says that Henry Cooper did the shooting and endeavored to prove it by proof beyond a reasonable doubt.

Sergeant Cooper has taken the stand and, under oath, has testified in a contrary manner.

There are certain things that I wish to state for the record, and I will not overburden the record as to the specific evidence because it speaks for itself.

I am aware, as Counsel have suggested, that the burden is on the State to prove the Defendant guilty beyond a reasonable doubt, and I am aware that the Defendant is not required to prove his innocence.

The Court is also aware that motive, while it is not an element of the offense, has not been shown here, and I will take it into account, when I weigh the other evidence in this case.

If there were a Jury here rather than a Bench trial, I would instruct them as follows as to their duty, to judge the credibility of witnesses, and I would instruct them that you are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them, and in considering the testimony of any witness you must take into account his ability and opportunity to observe, his age, his memory, his manner while testifying, any interests, bias or prejudice he may have and the reasonableness of his testimony, considered in the light of all the evidence in the case.

Since there is not a Jury in the box, I will endeavor to do exactly that.

Simply stated, the State has presented certain witnesses. I believe their testimony. Sergeant Cooper has told three variations, essentially of the event. Sergeant Cooper, I do not believe any of them.

Mr. Royce had asked the ultimate question: is there any reasonable doubt of guilt? I will simply say no.

Mr. Claps had indicated that there is no one factor that shows Cooper guilty, but when they are all taken together, they do prove his guilt. I agree with that statement.

In the judgment of the Court, the State has met its burden of proving all of the elements of the offense of murder beyond a reasonable doubt, and accordingly the Court is entering a finding of guilty to the offense of murder, and judgment is entered on that finding." (R. 428-430)

Opposition

FILED
FEB 8 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1145

In the Supreme Court of the United States

OCTOBER TERM, 1981

HENRY COOPER,
PETITIONER,
VS.
PEOPLE OF THE STATE OF ILLINOIS,
RESPONDENT.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

TYRONE C. FAHNER
Attorney General, State of Illinois
160 North LaSalle St.
Suite 900
Chicago, Illinois 60601
(312) 793-3500

HERBERT KAPLAN

MELBOURNE A. NOEL, JR.

MICHAEL WEINSTEIN
Assistant Attorneys General,
188 West Randolph St.
Suite 2200
Chicago, Illinois 60601
(312) 793-2570
Attorneys for Respondent.

MAUREEN CAIN
Assistant Attorney General,
188 W. Randolph St.
Suite 2200
Chicago, Illinois 60601
(312) 793-2570
Of Counsel.

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REASONS FOR DENYING THE WRIT

THE REVIEWING COURT'S FINDING OF INDICTMENT SUFFICIENCY IS IN CONFORMITY TO FEDERAL LAW

Case law is dispositive regarding the function of an indictment in the criminal justice process. An indictment must state all the elements of the charged crime, it must apprise the defendant of the crime charged in order that he prepare an adequate defense at trial and the language of the indictment must be specific enough to prevent a subsequent double jeopardy violation. *Russell v. United States*, 369 U.S. 749 (1962), *United States ex rel Harris v. State of Illinois*, 457 F.2d 191, (Seventh Circuit, 1972). The petitioner, however, alleges a fatal defect of the indictment in the instant case due to an amendatory addition made to the name of the victim. (Petitioner's Brief, p. 10).

Initially, it should be noted that a defendant's failure to challenge an alleged error in an indictment after verdict allows claims of insufficiency to be viewed most favorably in support of the indictment's sufficiency. *Davis v. United States*, 411 U.S. 233 (1973), *United States v. Willis*, 515 F.2d 798 (7th Circuit, 1975). Additionally, although claims related to the use of defendant alias are subject to an examination of opprobrious effect, *United States v. Sholek*, 474 F.2d 582 (10th Circuit, 1973); it has been held that the lack of specific victim identification, *United States v. Gay*, 577 F.2d 465 (8th Circuit, 1978), as well as lack of specific identification of innocent participants in an illegal act, *United States v. Roya*, 574 F.2d 386 (7th Circuit, 1978), have not constituted adequate bases of claims of insufficiency of an indictment.

In the instant case, the petitioner was a long term acquaintance of the victim (R. 331), the petitioner was aware of the victim's death as early as five minutes after the incident (R.

377) and the petitioner was aware as early as six days after the shooting that an arrest warrant charging him with the crime had been executed the day after the incident (R. 438). This combination of facts led the Appellate Court to correctly determine that the amendatory change on the indictment was a matter of form, rather than substance and did not constitute error. (Petitioner's Brief, p. 5a) *People v. Cooper*, 97 Ill.App.3d 222, 422 N.E.2d 885 (1981). Thus, the petitioner has failed to raise an issue warranting constitutional scrutiny by this Court.

THE REVIEWING COURT'S FINDING THAT CERTAIN EXPERT WITNESS TESTIMONY WAS PROPERLY ADMITTED IS CORRECT AND CONFORMS TO FEDERAL LAW

Trial court judges are given broad discretion to determine the qualifications of expert witnesses. *United States v. Dellinger*, 472 F2d 340 (Seventh Circuit, 1972). Witness Stein's qualifications as a forensic pathologist were the subject of a stipulation entered into by the petitioner. (R. 297, 306-309) Petitioner's allegation of error appears to rest on a claim that a forensic pathologist may testify as to cause of death, but not to manner of death. (Petitioner's Brief. p. 17) No authority is cited for this proposition.

The respondent submits, that "where a witness properly qualified as an expert bases his opinion on what he believes to be a reasonable scientific inference, his opinion should ordinarily be admitted subject to cross-examination concerning the propriety of the testing technique used and the validity of the conclusions drawn from his observations." *United States v. Cyphers*, 553 F2d 1064 (Seventh Circuit, 1977). Such cross-examination occurred in the instant case. (R. 267-291) Illinois evidentiary rulings mirror this federal rule. *People v.*

Kirkwood, 17 Ill.2d 23, 160 N.E.2d 766 (1959), *People v. Carbona*, 27 Ill.App.3d 988, 327 N.E.2d 546 (1975). Thus, petitioner's claim of error based on the admission of witness Stein's testimony is not an error of constitutional proportion.

THE REVIEWING COURT'S FINDING OF SUFFICIENCY OF EVIDENCE IS CONSISTENT WITH CONSTITUTIONALLY MANDATED STANDARDS

The correct standard to be employed by the trier of fact in a criminal proceeding is a finding of proof beyond a reasonable doubt of the defendant's guilt. *Jackson v. Virginia*, 443 U.S. 307, (1981). A more rigid statement has traditionally been required under Illinois law when record evidence is of a circumstantial nature. *People v. Pappas*, 66 Ill.App.3d 360, 383 N.E.2d 1190 (1978). The petitioner's allegation of error is that the use of circumstantial evidence commands the utilization of an exclusion of innocence hypothesis as the legal test for determining sufficiency of evidence necessary to support a conviction. (Petitioner's Brief, p. 19).

Although a rule mandating a more stringent test for evaluation of circumstantial evidence also prevailed in federal criminal trials it has been rejected. *Holland v. United States*, 348 U.S. 121, 140 (1954). Today, the constitutionally required criterion for determining sufficiency of evidence is "whether a rational trier of fact could find guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 317 (1980). This guilt beyond a reasonable doubt standard is defined as "evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." *Jackson, supra*, 443 U.S. 307, 313, 314. Clearly, the trial court applied such a standard in its determination. (Petitioner's Brief, p. 11a, Finding Of the Circuit Court). In addition, the reviewing court articulated the

more stringent local standard and found it "not improbable or unlikely that the trial court could have found defendant guilty by a reasonable or moral certainty. (Petitioner's Brief, p. 7a)

This Court has recently described the role of the federal judiciary in direct review of a state court conviction. *Jackson, supra,* 443 U.S. 307, 318. Deference must be given to the role and attendant responsibility of the trier of fact fairly to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. The presumption utilized at the onset of appellate review is that "upon judicial review, all of the evidence is to be considered in the light most favorable to the prosecution. *Jackson, supra,* 443 U.S. 307, 319.

The respondent submits that the allegation of error, utilization of an inappropriate legal test to determine guilt, is properly characterized as a greater restriction on the prosecution than that deemed necessary by this Court in order to insure against constitutional infringement. For in effect, the petitioner is requesting this Court to find error because the alternative innocent hypothesis of accident or suicide were not disproved. This Court, however, need not extend its analysis of claims of error in a state court proceeding that exceed constitutional protections. *Oregon v. Hass,* 420 U.S. 714, 719 (1975).

The record in the instant case indicates utilization of the federally mandated standard of guilt beyond a reasonable doubt by the trial court judge and this finding was affirmed by the reviewing court below. Thus, the petitioner has failed to establish a constitutional violation warranting review by this court.

CONCLUSION

For the above-mentioned reasons, that the issues raised are either subject to dispositive rulings of the Court or fail to state a constitutionally meritorious claim, the respondent requests that the petition for writ of certiorari to review the judgment of the Illinois Appellate Court of Illinois should be denied.

Respectfully submitted,

TYRONE C. FAHNER,
Attorney General, State of Illinois
160 N. LaSalle Street, Suite 900
Chicago, Illinois 60601
(312) 793-2585

HERBERT KAPLAN,

MELBOURNE A. NOEL, JR.,

MICHAEL WEINSTEIN,
Assistant Attorneys General,
188 W. Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570,

Attorneys for Respondent.

MAUREEN CAIN,
Assistant Attorney General,
188 W. Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570,

Of Counsel.